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No. 89-1697

In The

Supreme Court of the United States

October Term, 1989

PATRICK M. O'RILEY,

Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Four

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Court review a California intermediate appellate court decision holding that federal courts have exclusive jurisdiction over claims under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801 *et seq.*?

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner has failed to establish a basis for the Court to grant certiorari in this case: A panel of California appellate court justices has considered and followed a well-reasoned federal district court opinion and a California appellate court decision that adopted its analysis.

Petitioner has not demonstrated the existence of a question that would merit consideration by this Court. Petitioner only argues that the decision below follows one federal district court case rather than another.

Finally, the decision below is correct: A careful analysis of the issue establishes that federal courts have exclusive jurisdiction of PMPA disputes.

STATEMENT OF THE CASE

This is an action between a service station franchisee, Petitioner Patrick M. O'Riley ("O'Riley") and a petroleum marketing franchisor, Union Oil Company of California ("Union")[1] arising out of Union's termination of O'Riley's franchise.

The action was originally commenced by Union seeking to recover from O'Riley money owed Union prior to the termination. In response to the complaint, O'Riley cross-complained against Union alleging, among other

[1] Union Oil Company of California is a fictitious business name of Unocal Corporation. Its only non wholly-owned subsidiary is Union Exploration Partners, Ltd.

things, a wrongful termination of his franchise under the PMPA.

Subsequent to the entry of the trial court's judgment, entered in favor of Union on two state law claims, and against Union on the PMPA claim, the California court of Appeal, in the case of *Niakan v. Samaan*, (1988) 199 Cal.App.3d 716, held that jurisdiction of PMPA claims is exclusively federal. The *Niakan* Court relied on and adopted the reasoning of a federal district court case *Rustom v. Atlantic Richfield Co.*, 618 F. Supp. 210 (C.D.Cal. 1985).

Based on the holdings of *Rustom* and *Niakan*, Union appealed the PMPA portion of the judgment on the ground that the trial court had lacked jurisdiction. The California Court of Appeal agreed and reversed the entire judgment.

O'Riley then sought review in the California Supreme Court. Review was denied on February 1, 1990.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT MERIT CONSIDERATION FOR CERTIORARI

"Certiorari is granted only in cases involving principles the settlement of which is of importance to the public and in cases where there is a real and embarrassing conflict of opinion and authority between the federal courts of appeal." *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502, 95 L.Ed. 479, 71 S.Ct. 453 (1950).

The issue of jurisdiction over PMPA claims has not yet been addressed by any federal court of appeals. Indeed, Petitioner merely states that the decision below agrees with a decision of a California federal district court rather than with the earlier decision of a Connecticut federal district court. *Compare, Rustom v. Atlantic Richfield Co.*, 618 F.Supp. 210 (C.D. Cal. 1985) with *Ted's Tire Service, Inc. v. Chevron, U.S.A., Inc.*, 470 F.Supp. 163 (D. Conn. 1979).

Petitioner says that "for six years, the holding of *Ted's Tire Service* was cited only with approval in dozens of cases." Petition at 9. However, Petitioner fails to identify *any* case which cites *Ted's Tire* with approval.[2]

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[2] Respondent is aware of only two reported decisions that cite *Ted's Tire* with approval on the issue of PMPA jurisdiction, *Sun Refining & Marketing Co., Inc. v. D'Arpino*, 112 F.R.D. 688 (S.D.N.Y. 1986), and *C.N. Brown Co. v. Gillen* (1990) Maine Sup.Ct. No. 5333, 569 A.2d 1206. *Sun* made no analysis of the issue, merely refusing to accept removal jurisdiction and remanding with the observation that defendant could raise his PMPA issues in the state court. The *Sun* court indicates no awareness of any contra authority. *C.N. Brown* is the only case that makes any analysis and it does come to opposite conclusions on each of the factors cited by *Rustom* and *Niakan*.

Petitioner's assertion of "dozens of cases" is apparently based on the fact that a number of decisions cite *Ted's Tire*, not as precedent for finding PMPA jurisdiction to be exclusive, but merely as parenthetical examples of a case holding jurisdiction of a federal statute to be concurrent: *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 913; (remarking in passing that "[i]n the Petroleum Marketing Practices Act . . . for example, Congress created a private right of action without limiting jurisdiction to

(Continued on following page)

Petitioner then quite correctly states that "in 1985, the matter was reconsidered in *Rustom* [*supra.*,] . . . [which], relying on its reading of the language and legislative history of the PMPA, decided that Congress intended exclusive jurisdiction over PMPA claims." Petition at 10.

Accordingly, Petitioner has not shown the type of conflict contemplated by *National Labor Relations Board, supra.* The issue is one of interest not to the public at large, but only to a small group of private litigants and no "embarassing conflict of opinion" exists.

II. THERE IS NO SUBSTANTIAL FEDERAL ISSUE TO RESOLVE BECAUSE FEDERAL COURT JURISDICTION OVER PMPA CLAIMS IS EXCLUSIVE

While it is of course correct that a presumption of concurrent jurisdiction over actions arising under a federal statute exists, it is also correct that the presumption is rebuttable "by explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state court jurisdiction and federal interests." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478, 101 S.Ct. 2870, 2875, 69 L.Ed.2d 784, 791 (1981).

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federal courts."); *California Arco Distributors, Inc. v. Atlantic Richfield Co.* (1984) 158 Cal.App.3d 349, 364 (citing *Ted's Tire* as its sole support for the statement that "we are cognizant that state courts have concurrent jurisdiction to enforce the PMPA . . . "); and *Lane v. Central Bank of Alabama*, 756 F.2d 814, 817 (11th Cir. 1985) (Including *Ted's Tire* in a list of decisions supporting the lower court's notation that use of the permissive term "may" in the jurisdictional provision of a federal statute is consistent with the presumption of concurrent jurisdiction).

The PMPA provides that parties may seek redress for violations of the PMPA "in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such business of such franchisor is located or in which such franchisee is doing business . . . " 15 U.S.C. 2805(a). The PMPA goes on to incorporate federal procedural standards, stating that damages are available "consistent with the Federal Rules of Procedure" and applying Rule 65 standards for the issuance of injunctions. 15 U.S.C. 2805(d)(1)(A); 2805(b)(2). Thus, the plain terms of the statute contemplate federal, not state, jurisdiction over PMPA claims.

There is a conspicuous absence in both the Senate and House Reports, of reference to the bringing of a PMPA claim in state court: "The provisions of Title I are enforceable by private civil action in U.S. District Court." S. Rep. No. 95-731, 95th Cong. 2d Sess. *reprinted in*, 1978 U.S. Code Cong. & Ad News at 874; Rep. No. 95-161, 95th Cong. 1st Sess. 14 (1978).

As the Ninth Circuit reasoned in *Valenzuela v. Kraft, Inc.*, 739 F.2d 434, 436 (9th Cir. 1984),

> "Although not determinative, the absence of reference to the state courts combined with Congress' affirmative references to the federal courts, suggests an intent to make federal jurisdiction exclusive."

The *Valenzuela* court based its holding on references in the legislative history only to the maintenance of an action in federal court and the incorporation of the standards of Fed.R.Civ.P. 65 applied to the issuance of preliminary injunctions.

Recently, the Supreme Court of Pennsylvania carefully reviewed the "few cases which deal with the precise question of whether that presumption is applicable [to the PMPA]." *Johnson v. Mobil Oil Corp.*, 560 A.2d 124, 125 (Pa. 1989). The *Johnson* court was guided "by the carefully researched and soundly reasoned opinion of the Judge Tashima in *Rustom* [*supra.*,] which concluded that such concurrent state court jurisdiction does not exist with respect to actions under the PMPA." *Johnson, supra.*, at 125.

The *Rustom* and *Johnson* courts point to the strong indictions in the legislative history as well as provisions of the PMPA itself as the "unmistakable implication" of Congressional intent overriding the presumption of concurrent jurisdiction.

Ted's Tire, on the other hand, reached an opposite conclusion based solely on a brief linguistic analysis of 15 U.S.C. 2805(a). It makes no study of the legislative history. The court in *Rustom* took note of Congress' specific reference only to federal court jurisdiction (618 F.Supp. at 212), a point overlooked altogether by the court in *Ted's Tire*. Both *Rustom* and *Johnson* properly dismiss the holding of *Ted's Tire* as cursory and analytically deficient. *See, Rustom, supra.*, at 211-212 and *Johnson, supra.*, at 125, fn.1.

As noted above, Congress specifically incorporated into the PMPA only federal standards to govern two particular areas: injunctive relief and damages.

The availability of injunctive relief under the PMPA is governed by 15 USC § 2805(b)(2). In discussing this provision the Senate Report makes unmistakably clear just what standards govern:

> "In utilizing this standard [referring to Sec. 105 of the PMPA, 92 Stat 331, codified as 15 USC Sec. 2805] for the grant of preliminary injunctive relief, the committee has embraced a judicial standard utilized by the Second Circuit." Sen. Rep. No. 95-731, *supra*, at 41, as *reprinted, supra*, 1978 U.S. Code Cong. & Admin. News at 899.

Congress even cited as representative of that standard the Second Circuit's decision in *Jacobson & Co., Inc. v. Armstrong Cork Co.*, 548 F.2d 438 (2d Cir. 1977). *Id.*

The *Rustom* court considered this factor to be significant (618 F. Supp. at 212-13), while *Ted's Tire* missed it completely.

The PMPA further links the measure of damages to federal law by providing that

> "[i]f the franchisee prevails in any action under subsection (a), such franchisee shall be entitled –
>
> "(A) consistent with the Federal Rules of Civil Procedure, to actual damages." 15 USC Sec. 2805(d)(1).

Again, *Rustom* cites this reference as significant (618 F. Supp. at 213) while *Ted's Tire Service* misses it entirely.

III. CONCLUSION

The issues of exclusive versus concurrent jurisdiction over causes of action under the Petroleum Marketing Practices Act, while of significance to a discrete class of litigants, is not appropriate for review by this Court.

Moreover, with only one exception, the courts which have thoughtfully and thoroughly scrutinized the relevant factors have come to the same conclusion as the court below in this case: Congress intended that jurisdiction of PMPA actions be exclusively federal.

It is respectfully urged, therefore, that the Petition be denied.

Respectfully submitted,

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